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IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-1183

CARBON FUEL COMPANY,

Petitioner

vs.

UNITED MINE WORKERS OF AMERICA; DISTRICT 17, UNITED MINE WORKERS OF AMERICA; AND LOCAL UNIONS NOS. 6572, 7626 AND 2236, UNITED MINE WORKERS OF AMERICA,

Respondents

On Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

MOTION OF BITUMINOUS COAL OPERATORS' ASSOCIATION, INC. FOR LEAVE TO FILE BRIEF AMICUS CURIAE AND BRIEF OF BITUMINOUS COAL OPERATORS' ASSOCIATION, INC. AS AMICUS CURIAE IN SUPPORT OF THE POSITION OF CARBON FUEL COMPANY

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MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE

Bituminous Coal Operators' Association, Inc. (hereinafter referred to as "BCOA") respectfully moves the Court for leave to file a brief *Amicus Curiae* in support of the position of Petitioner, Carbon Fuel Company.

BCOA is a voluntary non-profit association of bituminous coal mine operators that have been unionized by the United Mine Workers of America ("UMWA"). Its members produce approximately 40 percent of the bituminous coal mined in the United States. BCOA is the sole and exclusive bargaining agent, recognized under the National Labor Relations Act, for its member companies in a multi-employer bargaining unit. Under its

Constitution and By-laws, BCOA is authorized to negotiate national wage agreements with UMWA. It is also authorized to interpret and aid in implementing labor agreements on behalf of its members.

In October, 1968, and in November, 1971, BCOA, on behalf of its members, entered into the National Bituminous Coal Wage Agreements that are involved in *Carbon Fuel Company v. United Mine Workers of America, et al.*, No. 78-1183. The decision of the United States Court of Appeals for the Fourth Circuit in the *Carbon Fuel* case directly affects those labor agreements. The decision purports to interpret those agreements and improperly holds that the United Mine Workers of America (the International Union) and District 17, United Mine Workers of America (District 17) may escape liability for illegal work stoppages by their members over arbitrable issues even though these unions failed to use any and all reasonable means at their command to prevent or terminate these illegal strikes.

Further, BCOA is the plaintiff in an action pending in the United States District Court for the Western District of Pennsylvania (Civil Action No. 75-1168) wherein BCOA is seeking a declaration that the International Union's failure to take prompt and effective action to prevent, stop, and end illegal work stoppages over arbitrable issues violated the International's contractual duty to BCOA under the National Bituminous Coal Wage Agreement of 1974.

BCOA has attempted to obtain "consents" to the filing of this brief pursuant to Supreme Court Rule 42. Counsel for Petitioner has given such consent, but counsel for Respondents has declined to do so. However, counsel for Respondents has stated to BCOA that Respondents would not oppose the filing of a Brief *Amicus Curiae* by BCOA.

WHEREFORE, BCOA moves the Court to allow the filing of the "Brief Of Bituminous Coal Operators' Association, Inc. As *Amicus Curiae* In Support Of The Position Of Carbon Fuel Company," which is submitted herein with the requisite number of printed copies.

Respectfully submitted,

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BRIEF OF BITUMINOUS COAL OPERATORS' ASSOCIATION, INC. AS AMICUS CURIAE IN SUPPORT OF THE POSITION OF CARBON FUEL COMPANY

INTEREST OF THE BITUMINOUS COAL OPERATORS' ASSOCIATION, INC.

Bituminous Coal Operators' Association, Inc. (hereinafter referred to as "BCOA") is a voluntary, non-profit association of bituminous coal mine operators that have been unionized by the United Mine Workers of America ("UMWA"). It was formed in 1950 out of an effort to

bring a degree of stability out of the labor-management relations chaos that had long characterized the coal industry. Since that time, BCOA has existed and continues to exist for the purposes of negotiating on behalf of its members periodic labor agreements with the UMWA, aiding its members in interpreting these agreements, devising and strengthening mechanisms for bringing about industrial peace in the coal industry, securing observance by members and by the UMWA of these agreements and engaging in other activities to improve stability of employment and harmonious labor relations in the coal mining industry throughout the United States.

The membership of BCOA includes both individual coal companies and state and local coal associations. Members of BCOA are located throughout all of the coal producing states and collectively produce approximately 40 percent of the bituminous coal mined in the United States.

BCOA is the sole and exclusive bargaining agent, recognized under the National Labor Relations Act, for its member companies in a multi-employer bargaining unit. Under its constitution and by-laws, BCOA is authorized to negotiate national wage agreements with UMWA. It is also authorized to interpret and aid in implementing such labor agreements on behalf of its member companies.

The United Mine Workers of America represents and acts on behalf of its members and subordinate administrative subdivisions, including district and local unions, for purposes of negotiating periodic labor agreements covering wages, hours of work and other conditions of employment, including provisions for the

settlement of grievances of its members and the prosecution of grievances on behalf of its members.

In October, 1968, BCOA, on behalf of its member companies, and UMWA, on behalf of its members, entered into the National Bituminous Coal Wage Agreement of 1968 (hereinafter the "1968 Agreement"). In November, 1971, BCOA, on behalf of its member companies, and UMWA, on behalf of its members, entered into the National Bituminous Coal Wage Agreement of 1971 (hereinafter the "1971 Agreement"). The instant case directly involves these labor agreements. The 1968 Agreement and the 1971 Agreement were entered into by BCOA to improve the wages, hours, conditions, and safety of UMWA members and to obtain, in return, the uninterrupted and faithful services of UMWA's members during the terms of those Agreements. In subsequent years, the most recent being 1978, BCOA and UMWA have entered into substantially similar labor agreements.

BCOA, therefore, has a compelling interest in the continued and faithful adherence by its members and by the UMWA to such labor agreements. BCOA also has a direct, vital and continuing interest in preserving and strengthening the contractual procedures for resolving grievances and disputes and in bringing industrial peace to the coal fields which have been plagued by a national pattern of illegal wildcat strikes over localized arbitrable disputes.

The decision of the Court below seriously undermines the efficacy of the "Settlement of Disputes" procedures contained in the 1968 and 1971 labor agreements and sanctions instability and unrest in the coal industry. Consequently, the Fourth Circuit's decision adversely

affects the interests of BCOA and all its member companies since that decision impinges directly and disastrously on one of BCOA's major concerns—the stability of industrial relations under its agreements. Moreover, the decision of the Court below poses a serious threat to the energy-consuming public and to the national economy since unrest and work stoppages in the coal fields curtail the available supply of coal throughout the United States and impede the growth of coal production and the institution of new coal producing facilities, which are essential to this country's efforts to meet the current energy crisis and increased demand for fuel.

QUESTION PRESENTED

Whether a labor organization has a legal obligation to use every reasonable means at its command to prevent and terminate illegal strikes by its members over arbitrable disputes, particularly where, as here, the union has expressly promised to maintain the integrity of its labor agreements?

STATEMENT OF THE CASE

A. Background Facts

This is an action under § 301 of the Labor-Management Relations Act of 1947, 29 U.S.C. § 185.

Petitioner Carbon Fuel Company (hereinafter the "Company")[1] brought this suit against the United Mine Workers of America (hereinafter the "International Union"), District 17, United Mine Workers of America (hereinafter "District 17"), and Local Union Nos. 6572, 7626 and 2236, United Mine Workers of America (hereinafter the "Local Unions")[2] seeking injunctive relief and damages for a series of forty-eight strikes occurring during the years 1969-1973 inclusive. These strikes were allegedly in violation of the terms of the 1968 and 1971 National Bituminous Coal Wage Agreements.

The 1971 Agreement provided means for the peaceful settlement, through a mandatory grievance-arbitration procedure, of all disputes, differences as to the meaning and application of contract provisions, differences as to matters not specifically mentioned in the contract and any local trouble of any kind arising at a mine. These means included multiple-step grievance-handling procedures culminating, if necessary, in final and binding arbitration. Pursuant to Article XVII of the 1971 Agreement, the International pledged itself to make "an earnest effort" to settle all differences between itself and BCOA and any "local trouble" "at the earliest practicable time." Pursuant to Article XX of the 1971

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1. The Company is a member of BCOA.
2. The International Union is the duly recognized collective bargaining representative for the Company's production and maintenance employees.

Agreement, the International pledged itself to "maintain the integrity of the contract" and agreed that "all disputes and claims which are not settled by agreement shall be settled by the machinery provided in the 'Settlement of Disputes' article of this agreement. . . ." Almost identical provisions were contained in the 1968 Agreement.[3]

BCOA contends that, as a consequence of the aforesaid undertakings in the collective bargaining agreements, the International Union and its administrative subdivisions are obligated to take appropriate and timely steps to assure compliance by their members with the agreements and to end illegal picketing and work stoppages. To accomplish this end, the International and its administrative subdivisions are obligated to use any and all reasonable means at their command to ensure contract compliance, and to prevent wildcat strikes by their members over arbitrable disputes.

B. Proceedings in the District Court

A jury trial on the issue of damages was held in the United States District Court for the Southern District of West Virginia. The evidence presented therein established the occurrence of forty-eight separate strikes, each of which was engaged in by all of the members of the Local Unions employed at the locations in question. The evidence further showed that none of the strikes had been formally called or authorized by the International, District 17 or any of the Local Unions, and

3. Similarly, almost identical provisions were contained in the 1974 Agreement and are contained in the current 1978 National Bituminous Coal Wage Agreement.

that representatives of the International and its subdivisions made verbal and written requests to the strikers to return to work. However, the evidence also showed that neither the International, District 17, nor any of the Local Unions took any disciplinary action or other steps to prevent or end the strikes.[4]

At the conclusion of the evidence, the District Court directed the jury to find that the Local Unions had violated the labor agreements with respect to all of the strikes because of the mass actions of their members and officers in participating in them. The issue of the liability of the International and District 17 was submitted to the jury with the instruction that the International and District 17 had a responsibility under the labor agreements to use all reasonable means available to them to prevent and end strikes in violation of the labor agreements, and that from such time as they had an opportunity to use such means and failed to do so, they were liable for the strikes. The question of the amounts of damages was also submitted to the jury.

The jury returned individual verdicts as to each strike, aggregating damages of $206,547.80 against the International Union, $242,130.80 against District 17, and

4. The International has authority under its Constitution, for example, to suspend the autonomy of any district or local union which instigates, aids or condones, ratifies or sanctions any illegal picketing or work stoppage. (*See* Article XVIII, UMWA Constitution.) The International also has authority to discipline all members, including officers and committeemen of subordinate subdivisions, who fail or refuse to comply with the labor agreements or who instigate, condone or ratify illegal picketing or work stoppages; and to refuse to defend local unions or individuals who engage in, condone or instigate illegal strike activity. (*See* Articles XV and XVI of the UMWA Constitution.)

$722,347.43 against the Local Unions. Judgments were entered pursuant to the verdicts with respect to each stoppage and all of the Unions appealed.

C. The Decision of the Fourth Circuit

The United States Court of Appeals for the Fourth Circuit affirmed the judgments against the Local Unions as to thirty-one of the strikes. With respect to the remaining seventeen strikes, the Fourth Circuit held that they were "sympathy strikes" and, as such, did not violate the collective bargaining agreements in light of this Court's decision in *Buffalo Forge v. United Steelworkers of America*, 428 U.S. 397 (1976).[5]

In addition, the Fourth Circuit reversed all judgments as to District 17 and the International on the grounds that the District Court had erred in instructing the jury that District 17 and the International "had the duty and responsibility to use all reasonable means to prevent or terminate the wildcat strikes, and that the failure to do so would render them liable for the work stoppages." The Fourth Circuit held instead that the proper test for imposing liability upon the District and the International was whether these unions had "instigated, supported, ratified, or encouraged any of the work stoppages."[6] Finding no evidence of such conduct in the record, the Fourth Circuit held that the District Court had erred in denying the motions of the International and District 17 for directed verdicts.

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5. This Court's decision in *Buffalo Forge* was rendered after the trial in *Carbon Fuel* had been completed.

6. *Carbon Fuel Co. v. United Mine Workers of America*, 582 F.2d 1346, 1350-1351 (4th Cir. 1978).

This Court granted the Company's petition for writ of certiorari to review the question of whether the International and District 17 may be held liable for illegal work stoppages because of their failure to use all reasonable means to prevent or terminate illegal strikes by their members over arbitrable disputes.

SUMMARY OF ARGUMENT

This action raises critical issues concerning our national labor laws and policy.

In the National Bituminous Coal Wage Agreements of 1968 and 1971, the United Mine Workers of America explicitly pledged to settle all local labor disputes by means of the grievance-arbitration processes established in the Agreements and to "maintain the integrity" of these Agreements. Further, the UMWA implicitly promised not to strike over arbitrable disputes during the terms of these Agreements. *Gateway Coal Company v. United Mine Workers of America*, 414 U.S. 368 (1974).

Despite these contractual undertakings, members of the UMWA have engaged in a national pattern and practice of picketing and work stoppages over localized arbitrable disputes. These illegal work stoppages by UMWA members have resulted in staggering losses in production, wages, medical benefits and pension benefits, and have also impeded this country's efforts to meet the current energy crisis and our increased demand for fuel.

At the same time, the International Union and its administrative subdivisions have utterly failed and refused to utilize the array of means available to them to effectively prevent or end these illegal strikes by their

members. In the instant case, the Court below held that the failure of the International Union and District 17 to exercise such reasonable means to attempt to prevent or end the illegal strikes against Carbon Fuel did not violate their contractual undertakings since the International and District 17 had not instigated, ratified or encouraged any of these illegal strikes. In fact, the Court below held that the International and District 17 could have done absolutely *nothing* throughout the duration of such strikes and still have avoided liability for losses suffered by Carbon Fuel as the result thereof.

Amicus BCOA respectfully submits that the Court below erred. The failure of the International and its administrative subdivisions to use all reasonable means at their command to prevent or end such illegal strikes by their members over arbitrable disputes necessarily constitutes a breach of their contractual obligations under the National Bituminous Coal Wage Agreements. The contrary view of the Court below frustrates fundamental principles of our national labor laws and policy and also runs directly counter to fundamental principles of traditional contract law.

Peaceful resolution of industrial disputes through arbitration is the keystone of our national labor policy. Labor Management Relations Act, § 203(d); *Boys Markets, Inc. v. Retail Clerks Union Local 770,* 398 U.S. 235 (1970); *Gateway Coal Co. v. United Mine Workers of America, supra.* Further, Congress has directed parties to labor agreements to utilize every reasonable effort to maintain the grievance-arbitration processes established by such agreements. Labor Management Relations Act, § 204(a).

The Fourth Circuit's decision frustrates national labor policy as it sanctions instability and unrest in the coal fields and completely undermines the arbitration processes agreed upon by the parties. The International Union and its administrative subdivisions possess an array of potent alternatives to influence their striking members to return to work. In fact, these alternatives frequently represent the only effective means available to induce Local Union members to end their illegal work stoppages. If the International and its administrative subdivisions are not legally required to utilize these means, their pledge to resolve all localized disputes exclusively by grievance-arbitration would be rendered totally illusory and national labor policy would thereby be frustrated.

This Court, in the 31 years since the enactment of the Labor Management Relations Act, has consistently fashioned federal labor law which furthers, rather than frustrates, our national labor policy. *E.g., Boys Markets, Inc. v. Retail Clerks Union Local 770, supra.* In the instant case, national labor policy will be furthered only by recognition of an implied contractual obligation on the part of the International and its administrative subdivisions to use all reasonable means at their command to prevent or terminate illegal strikes by their members over arbitrable disputes.

In addition to frustrating national labor policy, the Fourth Circuit's decision runs directly counter to fundamental principles of traditional contract law. It is well-settled, as a matter of contract law, that obligations shall be construed to be effective rather than nugatory. As shown above, the Fourth Circuit's holding that the International and its administrative subdivisions could

sit by and do *nothing* throughout the duration of prolonged illegal strikes and still avoid liability under the National Bituminous Coal Wage Agreements essentially renders the UMWA's broad contractual pledges illusory.

Further, the fact that the illegal work stoppages resulted from the unauthorized "wildcat" actions of UMWA members does not excuse the UMWA's breach of its promise to settle all localized disputes by means of grievance-arbitration. Under traditional principles of contract law, a party will ordinarily not be excused from complying with his contractual undertakings by the interference of extrinsic forces or third parties. In the instant case, the UMWA's "excuse" is even less sympathetic than those presented in the traditional common law cases. Unlike most of the promisors in the traditional cases, the UMWA in this case has the power and the means to influence the actions of the parties who are allegedly interfering with its performance under the agreements. BCOA contends that the International and its administrative subdivisions should at the very least be legally compelled to exercise these reasonable means to influence their striking members to return to work.

As the United States Court of Appeals for the Third Circuit recognized in *Republic Steel Corp. v. United Mine Workers of America,* 570 F.2d 467, 480 (3d Cir. 1978), it is not asking too much "that the International fulfill some of its own responsibility to umpire, adjust, adjudicate, and settle, and where necessary, to impose sanctions upon those members who wilfully repudiate the obligations under the contract, defy the internal laws of the union, and disregard the federal statutes that constitute our national labor policy."

Contrary to the Fourth Circuit's decision, there is nothing in the bargaining history of the National Bituminous Coal Wage Agreements to preclude an implied contractual obligation on the part of the International and its administrative subdivisions to use all reasonable means to prevent or end illegal strikes by UMWA members. This Court clearly rejected a similar argument regarding the 1968 Agreement in *Gateway Coal, supra.* To the contrary, the bargaining history and the language of the Agreements support recognition of an implied obligation on the part of the International and its administrative subdivisions to use all reasonable means at their command to prevent or terminate illegal strikes by their members over arbitrable disputes.

Finally, BCOA's position would not impose an unreasonable or impracticable standard on the International or its administrative subdivisions. If all reasonable means to prevent or end an illegal strike are exercised, and the strike continues nevertheless, the UMWA would not be held responsible. Rather, the International and its administrative subdivisions would simply be required to make a good faith effort to use all reasonable means available to them to fulfill their express contractual undertakings. A standard which required anything less would clearly frustrate our national labor policy.

ARGUMENT

I. As A Matter Of National Labor Law And Policy, The International Union And Its Administrative Subdivisions Have A Legal Obligation To Use All Reasonable Means At Their Command To Prevent Or Terminate Illegal Strikes By Their Members Over Arbitrable Disputes.

In this action under § 301 of the Labor Management Relations Act, 29 U.S.C. § 185, the Court is called upon to interpret critical provisions of the 1968 and 1971 National Bituminous Coal Wage Agreements. Substantive federal common law, fashioned from the policy of our national labor laws, is the law to be applied in doing so. *Textile Workers Union of America v. Lincoln Mills,* 353 U.S. 448, 456 (1957).[7]

In the 1968 and 1971 National Bituminous Coal Wage Agreements, the International Union, for and on behalf of itself, its districts and its locals (hereinafter collectively referred to as the "Union"), explicitly promised to resolve all of its local labor disputes by means of the grievance arbitration process contained in the agreements. The *quid pro quo* for the Company's agreement to submit such disputes to grievance arbitration was an

7. In *Lincoln Mills, supra,* 353 U.S. at 457, the Court explained that "[t]he Labor Management Relations Act expressly furnishes some substantive law. It points out what the parties may or may not do in certain situations. Other problems will lie in the penumbra of express statutory mandates. Some will lack express statutory sanction but will be solved by looking at the policy of the legislation and fashioning a remedy that will effectuate that policy. The range of judicial inventiveness will be determined by the nature of the problem."

implied contractual undertaking by the Union not to strike over such issues throughout the duration of the contracts. *Gateway Coal Company v. United Mine Workers of America,* 414 U.S. 368, 382 (1974). Moreover, the Union and BCOA mutually and explicitly agreed to maintain the integrity of these labor agreements.

The Court below held that the International Union and District 17 fulfilled their contractual undertakings so long as they did not authorize, support, ratify or encourage any illegal strikes by their members. In other words, according to the Court below, the International and District 17 could disclaim responsibility for the losses suffered by the Company as the result of such illegal strikes simply by sitting by and doing nothing to prevent or terminate these illegal strikes by their members.

Amicus BCOA respectfully submits that the Court below erred. Fundamental principles of our national labor laws and policy mandate an implied contractual obligation on the part of the International Union and its administrative subdivisions to use all reasonable means at their command to prevent or terminate illegal work stoppages over arbitrable disputes. As we will show below, such an obligation is essential to "preserve the integrity" of the collective bargaining agreements, particularly the critical "Settlement of Disputes" provisions of these agreements. The Fourth Circuit's failure to recognize and enforce the Union's implied obligation has, for all practical purposes, rendered the "Settlement of Disputes" provisions totally illusory in view of the consistent pattern of "wildcat" strikes throughout the nation's bituminous coal-mining regions. Consequently, the Fourth Circuit's decision frustrates our national

policy of voluntary settlement of labor disputes through arbitration and should be reversed.

A. The Decision Of The Court Below Sanctions Instability And Unrest In The Coal Industry And Completely Undermines The Arbitration Process Agreed Upon By The Parties.

The evidence presented in this case, as well as similar evidence presented in numerous other lawsuits, establishes that members of the United Mine Workers of America have engaged in a national pattern and practice of picketing and work stoppages over disputes which are subject to the grievance and arbitration provisions of the National Bituminous Coal Wage Agreements.[8] In fact, the coal mining industry has the worst record by far of any major industry in frequency of "wildcat" strikes and production and wages lost due to wildcat strikes. The effect of these work stoppages on the medical and pension benefits of active and retired UMWA members has been nothing short of disastrous.[9] More-

8. *E.g., Consolidation Coal Co. v. International Union, UMW,* 431 F. Supp. 787 (W.D. Pa. 1977) (dismissal of complaint reversed, 585 F.2d 586 (3d Cir. 1978)); *United States Steel Corp. v. United Mine Workers of America,* 534 F.2d 1063 (3d Cir. 1976); *Southern Ohio Coal Company v. United Mine Workers of America,* 551 F.2d 695 (6th Cir. 1977); *Old Ben Coal Corp. v. Local 1487, United Mine Workers of America,* 457 F.2d 162 (7th Cir. 1972).

9. During the period January 1, 1970 through September 15, 1975, the reported losses occasioned by illegal

(Footnote continued on following page)

over, this national pattern of illegal work stoppages by UMWA members has not only curtailed the available supply of coal throughout the United States, but has also impeded the growth of coal production and the institution of new coal producing facilities. The reduction in the available supply of coal resulting from these illegal work stoppages has thus posed a serious threat to the national economy, has caused the unemployment of many thousands of workers in other industries, and has impaired the national defense and the national goal of becoming self-sufficient in meeting our energy needs.

Despite this dismal history, the International Union and its administrative subdivisions have utterly failed and refused to exercise their authority to utilize any of the means available to them[10] to effectively end or attempt to end the national pattern and practice of illegal picketing and work stoppages by their members in violation of their contractual duty to submit grievance disputes to arbitration.

(Footnote continued from preceding page)

picketing and work stoppages by UMWA members with respect to member companies of BCOA were as follows:

Year	Man-days Lost	Pay Roll Loss	Tonnage Loss	Pension & Trust Fund Loss
1970	593,000	$21,459,000	11,389,000	$ 4,555,000
1971	565,000	21,981,000	8,762,000	3,739,000
1972	516,000	21,783,000	8,372,000	5,023,000
1973	529,000	26,298,000	7,043,000	4,817,000
1974	1,006,000	51,858,000	11,496,000	10,312,000
1/1/75-9/15/75	1,368,000	76,000,000	16,500,000	22,000,000

See, Complaint by BCOA at 6, *Bituminous Coal Operators' Ass'n, Inc. v. International Union, UMWA,* Civil Action No. 75-1168 (W.D. Pa.).

10. *See* Brief, *supra* at 11, n.4.

Recognizing that illegal strikes seriously threaten the integrity and efficacy of the agreed-upon arbitration process, the United States Court of Appeals for the Third Circuit has held in a series of decisions that the International and its subdivisions have an implied obligation under the National Bituminous Coal Wage Agreements to use any and all reasonable means at their command as might be needed to prevent and end illegal picketing and work stoppages by their members.[11] For example, in *Republic Steel Corp. v. United Mine Workers of America, supra,* 570 F.2d at 479-480, the Third Circuit found that "the International has a particularly grave responsibility to employ all reasonable means to ensure that unlawful action be halted:"

> The International union simply must bear certain obligations if it is to continue to be entitled to the rights and benefits accorded by our national labor policy. To the extent that any union—local, district, or international; craft, industrial, or independent—refuses to enforce appropriately authorized union discipline upon recalcitrant members who violate either collective bargaining agreements or internal by-laws of the union, that union can be said

11. *Bituminous Coal Operators' Ass'n., Inc. v. United Mine Workers of America,* 585 F.2d 586 (3d Cir. 1978); *Republic Steel Corp. v. United Mine Workers of America,* 570 F.2d 467 (3d Cir. 1978); *United States Steel Corp. v. United Mine Workers of America,* 534 F.2d 1063 (3d Cir. 1976). *See also Eazor Express, Inc. v. International Brotherhood of Teamsters,* 520 F.2d 951 (3d Cir. 1975). The United States Court of Appeals for the Eighth Circuit has also held that a labor union is required to use its best efforts to return illegally striking workers to their jobs. *Wagner Electric Corp. v. Local 1104, I.U.E.,* 496 F.2d 954 (8th Cir. 1974).

> to have abrogated a proportion of valued rights granted to the union under our national labor policy.
>
> We note that through the instrumentality of the federal court system, the American public has intervened in recent years on literally thousands of occasions to umpire, adjust, adjudicate, settle, or impose sanctions in disputes between the local, district, and international units of the UMWA and the coal operators. We do not believe it is asking too much that the International fulfill some of its own responsibility to umpire, adjust, adjudicate, and settle, and where necessary, to impose sanctions upon those members who wilfully repudiate the obligations under the contract, defy the internal laws of the union, and disregard the federal statutes that constitute our national labor policy. [Footnote omitted]

The refusal of the Court below to recognize this contractual obligation sanctions continued unrest and instability in the coal industry. The Fourth Circuit held that the International and District 17 fulfilled their contractual undertakings by sitting by and taking no steps whatsoever to prevent continuance or recurrence of illegal strikes by their members. The Fourth Circuit's decision is an invitation to Local Union members to strike with impunity over arbitrable disputes rather than to abide by the contractual undertakings to settle such disputes peacefully without interruption of production. Since Local Union members cannot be held personally liable for their participation in such illegal strikes,[12] and since most Local Unions of the UMWA

12. *See Atkinson v. Sinclair Refining Co.,* 370 U.S. 238 (1962).

are, for all practical purposes, "judgment-proof",[13] the only inducements to end illegal work stoppages by union members reside in the hands of the UMWA hierarchy, *i.e.* the International and its districts. The Fourth Circuit would allow the International and its districts to fulfill their contractual undertakings without exercising any of these inducements. For all practical purposes, the Fourth Circuit's decision sanctions and encourages even more illegal strikes by UMWA members. As a result, the Company is deprived of its contractual *quid pro quo;* labor-management disputes in the coal industry are relegated to the picket line rather than the arbitral forum; and fundamental principles of our national labor policy are frustrated. This Court, in order to vindicate our national labor policy, should reverse.[14]

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13. For example, it was recently observed regarding Local Unions of the UMWA that, "[T]o those familiar with local union finances, the threat of massive fines seemed a joke. Many locals have bank accounts of, say, $66.23." New York Times, March 7, 1978, at 24, col. 5.

14. In addition, if the Fourth Circuit's position were adopted, the already overcrowded federal courts would continue to be inundated with actions involving disputes between the UMWA and the coal operators. As Judge Aldisert recently observed in *Republic Steel Corp. v. United Mine Workers of America, supra,* 570 F.2d at 480, n. 18, the International Union, its districts or its locals have been named as defendants in actions in the United States District Court for the Western District of Pennsylvania alone in over 300 cases from January 1, 1972 to December 21, 1977.

B. National Labor Policy Clearly Favors Grievance Arbitration As The Instrument For Resolving Labor Disputes And Mandates That Parties To Labor Agreements Utilize Every Reasonable Means To Maintain The Grievance Arbitration Provisions Contained In Those Agreements.

Congress and this Court have long recognized grievance arbitration as the preferred instrument for purposes of resolving disputes between labor and management. Moreover, parties to labor agreements are directed by Congress to utilize every reasonable effort to maintain the grievance arbitration processes established by such agreements.

Explicit Congressional expression of our national labor policy favoring grievance arbitration appeared at least as early as 1947 when Congress stated in § 203(d) of the Labor Management Relations Act, 29 U.S.C. § 173(d), that:

> Final adjustment by a method agreed upon by the parties is declared to be the desirable method for settlement of grievance disputes arising over the application or interpretation of an existing collective-bargaining agreement.

Moreover, in § 204(a) of that Act, Congress declared that, in order to prevent or minimize interruptions of the free flow of commerce growing out of labor disputes, employers and employees and their representatives shall *"exert every reasonable effort to make and maintain agreements* concerning rates of pay, hours, and working conditions." 29 U.S.C. § 174(a)(1) (emphasis added). Thus, the express language of the Labor

Management Relations Act requires the International and its administrative subdivisions to use *every reasonable effort* to prevent or end illegal work stoppages and thus maintain the integrity of the Settlement of Disputes provisions of the National Bituminous Coal Wage Agreements.

Further, as the Court recognized in *Lincoln Mills, supra,* 353 U.S. at 458, an even earlier expression of Congressional policy requiring an "every reasonable efforts" obligation can be found in Section 8 of the Norris-LaGuardia Act, 29 U.S.C. § 108, which denies injunctive relief to any person who has failed to make "every reasonable effort" to settle a labor dispute by negotiation, mediation or voluntary arbitration.

In the 31 years since the enactment of the Labor Management Relations Act, this Court has formulated an expansive body of federal law grounded upon the basic premise that industrial stability is best fostered by the substitution of arbitration for industrial strife. This keystone of federal labor policy was most thoroughly expounded in the opinions of the *Steelworkers Trilogy* in 1960.[15]

For example, in *United Steelworkers of America v. American Manufacturing Co.,* 363 U.S. 564, 566 (1960), the Court stated that the Congressionally-expressed national policy favoring peaceful resolution of labor disputes "can be effectuated only if the means chosen by the parties for settlement of their differences . . . is

15. *United Steelworkers of America v. American Manufacturing Co.,* 363 U.S. 564 (1960); *United Steelworkers of America v. Warrior & Gulf Navigation Co.,* 363 U.S. 574 (1960); *United Steelworkers of America v. Enterprise Wheel & Car Corp.,* 363 U.S. 593 (1960).

given full play." And in *United Steelworkers of America v. Warrior & Gulf Navigation Co.,* 363 U.S. 574, 578 (1960), the Court explained that the grievance-arbitration process is the most favored means for effectuating that policy,[16] and that the parties' objective in using the arbitration process is primarily to further *their common goal of uninterrupted production under the agreement.* The Court then held that an order to arbitrate a particular grievance should not be denied unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute.[17]

Two years later, in *Local 174, Teamsters v. Lucas Flour Co.,* 369 U.S. 95 (1962), the Court was called upon to resolve an issue that was in many respects analogous to the question presented in the instant case. In *Lucas Flour,* the union called a strike to protest the discharge of an employee. The collective bargaining agreement contained grievance-arbitration provisions which covered the dispute, but did not contain an express undertaking by the union not to strike. The Court held that, even in the absence of an express no-strike clause in the

16. The Court stated, 363 U.S. at 581:

> [T]he grievance machinery under a collective bargaining agreement is at the very heart of the system of industrial self-government. Arbitration is the means of solving the unforeseeable by molding a system of private law for all the problems which may arise and to provide for their solution in a way which will generally accord with the variant needs and desires of the parties. The processing of disputes through the grievance machinery is actually a vehicle by which meaning and content are given to the collective bargaining agreement.

17. *Id.* at 582.

collective bargaining agreement, an agreement that certain disputes "will be exclusively covered by compulsory terminal arbitration" gives rise to an implied promise by the union not to strike in response to these arbitrable disputes during the term of the contract. *Lucas Flour, supra,* 369 U.S. at 106. The Court stated that "a contrary view would be completely at odds with the basic policy of national labor legislation to promote the arbitral process as a substitute for economic warfare."[18]

With the recognition in *Lucas Flour* of a union's implied obligation not to strike in order to promote the arbitral process, it follows quite logically and necessarily that a union has a continuing obligation to use all reasonable means at its command to prevent or terminate illegal strikes over arbitrable disputes especially where, as here, the Union has expressly promised to maintain the integrity of the provisions of the Agreement. The contrary view of the Court below clearly runs directly counter to this Court's approach in *Lucas Flour.*

Eight years after the *Lucas Flour* decision, this Court reiterated the critical importance of arbitration in effectuating our national labor policy when it held in *Boys Markets, Inc. v. Retail Clerks Union Local 770,* 398 U.S. 235, 253 (1970) that a federal court has jurisdiction under Section 301 of the Labor Management Relations

18. *Lucas Flour, supra,* 369 U.S. at 105. The Court also explained that to hold otherwise than it did in *Lucas Flour* would "obviously do violence to accepted principles of traditional contract law." Similarly, *Amicus* BCOA submits that the Union in the instant case has a duty under principles of traditional contract law to use all reasonable means to prevent or end illegal strikes. *See* Brief, *infra,* at pp. 33-40.

Act to enjoin a strike over an arbitrable grievance, notwithstanding the anti-injunction provisions of the Norris-LaGuardia Act.

In *Boys Markets,* the Court explained that its earlier decision in *Sinclair Refining Co. v. Atkinson*[19] frustrated realization of the important national policy of promoting peaceful settlement of labor disputes through arbitration.[20] The Court explained that the *very purpose of arbitration procedures* is to provide a mechanism for the expeditious settlement of industrial disputes *without resort to strikes,* lock-outs, or other self-help measures. This basic purpose, continued the Court, is largely undercut if there is no immediate, effective remedy for those very tactics that arbitration is designed to obviate. Thus the Court, expressly overruling *Sinclair,* held that Norris-LaGuardia's policy of non-

19. 370 U.S. 195 (1962). In *Sinclair Refining Co. v. Atkinson,* the Court held that the anti-injunction provisions of the Norris-LaGuardia Act, 29 U.S.C. § 104, precluded a federal district court from enjoining a strike in breach of a no-strike obligation under a collective bargaining agreement even though that agreement contained provisions, enforceable under § 301(a) of the Labor Management Relations Act, for binding arbitration of the grievance dispute concerning which the strike was called.

20. In making its determination in *Boys Markets,* the Court reviewed the history of the Norris-LaGuardia Act, the Wagner Act and the Labor Management Relations Act and emphasized that the Norris-LaGuardia Act was responsive to a situation totally different from that which exists today, noting the shift of congressional emphasis "from protection of the nascent labor movement to the encouragement of collective bargaining and administrative techniques for the peaceful resolution of industrial disputes." *Boys Markets, supra,* 398 U.S. at 250-256.

intervention by the federal courts should yield to the overwhelming national interest in voluntary settlement of labor disputes through arbitration:

> We conclude . . . that the unavailability of equitable relief in the arbitration context presents a serious impediment to the congressional policy favoring the voluntary establishment of a mechanism for the peaceful resolution of labor disputes, that the core purpose of the Norris-LaGuardia Act is not sacrificed by the limited use of equitable remedies to further this important policy, and consequently that the Norris-LaGuardia Act does not bar the granting of injunctive relief in the circumstances of the instant case.[21]

In *Gateway Coal Co. v. United Mine Workers of America,* 414 U.S. 368 (1974), the Court extended its holding in *Boys Markets* to situations involving collective bargaining agreements where the union's undertaking not to strike was an implied, rather than an express, undertaking. Moreover, the collective bargaining agreement involved in *Gateway* was the 1968 National Bituminous Coal Wage Agreement, which is one of the agreements involved in the instant case.

In the course of its opinion in *Gateway,* the Court emphasized that "[t]he federal policy favoring arbitration of labor disputes is firmly grounded in congressional command."[22] In accord with this strong federal policy, the *Gateway* Court went on to hold that a broad arbitration provision contained in an agreement will always give rise to an implied "no-strike" obligation unless the agreement contains language *expressly negating* an undertaking not to strike.[23] Thus, in light of the critical role that arbitration plays in our federal labor policy, and recognizing the devastating effect that strikes have on the arbitration process, the Court ruled that a no-strike obligation will be implied unless *expressly negated* in the contract.

21. *Boys Markets, supra,* 398 U.S. at 253.

22. *Gateway Coal, supra,* 414 U.S. at 377.

The same considerations require that the Union be implicitly obligated to use all reasonable means to prevent or terminate illegal strikes by its members over arbitrable disputes and that such an obligation can be avoided only by *express contractual language negating such undertaking.* Such a rule is essential to vindicate our national labor policy. The Union clearly has not expressly disclaimed this obligation in the National Bituminous Coal Wage Agreements of 1968 and 1971.

Finally, nothing in the Court's decision in *Buffalo Forge Co. v. United Steelworkers of America,* 428 U.S. 397 (1976) is inconsistent with BCOA's position. In fact, in *Buffalo Forge* the Court emphasized that the "driving force behind *Boys Markets* was to implement the strong congressional preference for the private dispute settlement mechanisms agreed upon by the parties." 428 U.S. at 407. The Court in *Buffalo Forge* simply held that *Boys Markets* did not control the factual situation presented in *Buffalo Forge* because the strike was not over any dispute between the union and the employer that was even remotely subject to the arbitration provisions of the contract.

In sum, peaceful resolution of labor disputes by means of grievance arbitration is without a doubt the

23. *Id.,* at 382.

overwhelming goal of our national labor policy today. Labor and management have been (and continue to be) strongly urged by Congress to establish grievance arbitration processes for resolving disputes that arise in their ongoing relationships. Moreover, Congress has explicitly directed the parties to *exert every reasonable effort* to maintain the agreements they have entered into. It is also clear, however, that despite express contractual undertakings to settle their disputes with management by means of the contractual grievance arbitration process, members of the United Mine Workers of America have consistently engaged in a nationwide pattern and practice of work stoppages over arbitrable disputes. These illegal work stoppages render the contractual grievance-arbitration provisions illusory and thus frustrate the goals of our national labor policy. All the while, the International Union and its administrative subdivisions take the position that their contractual obligations are fulfilled by merely sitting by and doing nothing to prevent or end the stoppages by their members so long as they do not instigate, support, ratify, or encourage any of these work stoppages. The Union's position cannot be reconciled with the overwhelming national interest in the voluntary settlement of labor disputes through arbitration. The Union's position must therefore give way to an implied contractual obligation to utilize all reasonable means at its command to prevent or terminate illegal work stoppages by its members over arbitrable disputes.

II. Fundamental Principles Of Traditional Contract Law Require That The International Union And Its Administrative Subdivisions Have A Legal Obligation To Use All Reasonable Means At Their Command To Prevent Or Terminate Illegal Strikes By Their Members Over Arbitrable Disputes.

As shown in Part I above, the decision of the Court below should be reversed since it frustrates fundamental principles of our national labor policy. As an additional ground for reversal, *Amicus* BCOA respectfully submits that the Fourth Circuit's decision runs directly counter to fundamental principles of traditional contract law.[24]

In the 1968 and 1971 National Bituminous Coal Wage Agreements, the International Union pledged to make "an earnest effort" to settle any differences which might arise between itself and the members of BCOA as well as "any local trouble" which might arise at the mines.[25] The International further agreed to:

> maintain the integrity of th[e] contract and that all disputes and claims which are not settled by agreement shall be settled by the machinery provided in the 'Settlement of Disputes' article of this agreement unless national in character in which event the parties shall settle such disputes by free

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24. In *Local 174, Teamsters v. Lucas Flour, supra,* 369 U.S. at 105, the Court looked to "accepted principles of traditional contract law" as well as national labor policy in recognizing an implied contractual obligation not to strike when the labor agreement contains a grievance-arbitration provision.

25. See Article XVII of the 1971 Agreement and pp. 25-26 of the 1968 Agreement.

collective bargaining as heretofore practiced in the industry.[26]

In *Gateway Coal Co. v. United Mine Workers of America, supra,* 414 U.S. at 385, this Court determined that the above provisions in the 1968 Agreement gave rise to an implied no-strike obligation by the Union.

The evidence presented in the instant case established that the conduct of certain of the Union's members, on at least thirty-one occasions from 1969 through 1973, was inconsistent with the standards of conduct set forth in the above provision. In fact, as discussed in Part I above, UMWA members have engaged in a nationwide pattern and practice of illegal strikes over arbitrable disputes.

The decision of the Court below that, absent evidence of authorization or ratification of these breaches by their members, the International and District 17 are not liable therefor is simply and irreconcilably inconsistent with fundamental principles of traditional contract law.

First, one of the most basic principles of the common law of contracts declares that obligations shall be construed to be effective rather than nugatory. This principle has its origins in the English common law,

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26. 1971 Agreement at Article XX. The corresponding language at page 37 of the 1968 Agreement is identical except insofar as it designates the dispute settlement provisions as the " 'Settlement of Local and District Disputes' section" of the agreement. The machinery for dispute resolution provided for in the settlement of disputes article is a multiple-step grievance procedure culminating, if necessary, in final and binding arbitration.

where it has been expressed that contracts shall be interpreted *"ut res magis valeat quam pereat."*[27] *Mare v. Charles,* 4 W.R. 267, 25 L.J.Q.B. (n.s.) 119 (1856); *Vestry of St. Leonard's, Shoreditch v. Hughes,* 17 C.P. (n.s.) 137, 144 Eng. Rep. 55 (1864); *Broom v. Batchelor,* 4 W.R. 712, 25 L.J.Ex. (n.s.) 299 (1856). It has been recognized and applied by this Court[28] and by numerous other courts in this country.[29]

This fundamental principle has similarly been recognized by renowned legal scholars in the field of contracts. As Professor Corbin has explained, "[o]rdinarily, words in promissory form should not be interpreted so as to make them illusory."[30] Professor Williston has

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27. The literal translation of the Latin phrase is the following: "that the thing may rather have effect than be destroyed."

28. *Great Northern Ry. v. Delmar Co.,* 283 U.S. 686 (1931) (rail shipping rate schedule in contract construed so as not to violate long and short haul clause of Interstate Commerce Act); *Hobbs v. McLean,* 117 U.S. 567 (1886) (partnership agreement construed so as not to be invalid under statute prohibiting transfer of government contracts).

29. *E.g., Eazor Express, Inc. v. Teamsters,* 520 F.2d 951 (3d Cir. 1975) (no strike agreement by union construed as including duty to use all reasonable means to bring unlawful strike to an end); *Nederlandsch Amerikaansche Stoomvaart Maatschappij v. Stevedores' & Longshoremen's Benevolent Society,* 265 F. 397 (E.D. La. 1920) (collective bargaining agreement construed as imposing liability on union for failure of employees to work according to contract in good faith); *Martin v. Meles,* 179 Mass. 114, 60 N.E. 397 (1901) (Holmes, C.J.) (agreement to make a contribution to a trade association upheld by broadly construing plaintiff's promises and actions so as to provide consideration).

30. 6 A. Corbin, Contracts § 546 (1962 ed. & Supp. 1964).

similarly declared that "an interpretation which renders the contract or agreement valid and its performance possible will be preferred to one which makes it void or its performance impossible or meaningless."[31]

Simply stated, a fundamental principle of our traditional contract law requires that when parties undertake a contractual obligation, a court should not lightly construe that contract so as to release the parties from that obligation.

This principle is particularly applicable in the instant case. The International Union and District 17 have expressly undertaken to settle all localized disputes pursuant to the grievance-arbitration machinery in the Agreements and to maintain the integrity of the Agreements. Although the International and District 17 possess an array of potent methods[32] for complying with their obligations in the event of illegal strikes by their members, the Court below held that District 17 and the International may sit by and do *nothing* throughout the duration of a prolonged illegal strike and still avoid liability under the collective bargaining agreements. Thus, for all practical purposes, the Court below has rendered the Union's broad contractual pledges illusory, in clear contradiction to traditional contract law.

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31. 4 S. Williston, Contracts § 620 (1961 ed. & Supp. 1978).

32. For example, the International has authority to suspend the autonomy of any District or Local Union which instigates, aides or condones, ratifies or sanctions any illegal picketing or work stoppage. (*See* Article XVIII of UMWA Constitution). The International is also authorized to discipline individual members who participate in such illegal activity. (*See* Article XV of UMWA Constitution.)

In *Eazor Express, Inc. v. International Brotherhood of Teamsters,* 520 F.2d 951, 960 (3d Cir. 1975), the Third Circuit recognized and applied the aforesaid principle in holding the International Brotherhood of Teamsters responsible for illegal strikes when it failed to use all reasonable means to prevent or end such strikes. The Third Circuit explained as follows:

> A no-strike agreement would be illusory indeed were a union to be permitted to avoid all responsibility under it for the duration of a prolonged strike which was being carried on by the concerted action of all its members employed in the struck operation, merely because the strike was not initially authorized or called by the union as an organization or by those of its officers who were specially empowered to do so. *Rather than to construe a contract as producing such a result, the courts will favor a construction making the mutual promises binding and giving the contract legal effect.* 1A *Corbin on Contracts* 8-9; 3 *Corbin on Contracts* 168-191; 17 *Am. Jur. 2d* 452 [emphasis added].

Amicus BCOA respectfully submits that traditional contract law similarly compels that the United Mine Workers of America and its administrative subdivisions be held responsible for the illegal strikes of their members when they fail to exercise all reasonable means at their command to prevent or end such illegal strikes.

Further, a corollary to the principle that a contractual promise should not be construed so as to be illusory is the principle that a contractual promise should not ordinarily be construed so as to be excused by the

interference of extrinsic forces or third parties. *Day v. United States,* 245 U.S. 159 (1917).[33]

This principle is also particularly applicable in the instant case. The Union has expressly promised to attempt to settle differences "at the earliest practicable time" and to settle "all [localized] disputes and claims" by the contractual grievance-arbitration machinery. Consequently, when members of the Union engage in a strike over an arbitrable grievance, that conduct violates the contractual pledge to settle such disputes exclusively by means of the grievance-arbitration machinery. The International and District 17 contend, however, that they should be excused for this breach absent evidence that they actually authorized or ratified the so-called "wildcat" actions of their members. They contend essentially that their failure to perform their contractual undertakings is excused since it was the result of interference by extrinsic forces, *i.e.* their unauthorized striking members. As shown above, however, the intervention of activities by such "third parties" ordinarily does not excuse the breach of a contractual promise.

Moreover, the Union's "excuse" in the instant case is even much less sympathetic than those presented in the traditional common law cases. Unlike most of the promisors in the traditional case law who have been held liable for failure to perform their contractual obligations due to the intervention of extrinsic forces or third

33. *Accord, Columbus Ry., Power & Light Co. v. City of Columbus,* 249 U.S. 399 (1919); *Barry v. United States,* 229 U.S. 47 (1913).

parties,[34] the International Union and District 17 have the power to influence the actions of the parties who are allegedly interfering with their performance under the labor agreements. As members of the International Union and of District 17, the strikers are susceptible to being influenced in their decision to strike, or to continue to strike, by an array of legitimate methods at the Union's disposal.[35] Yet the International and District 17 seek to disclaim responsibility for the illegal strikes without even exercising these means to prevent or end the illegal actions of their members.

In sum, under fundamental principles of contract law, the International Union and District 17 would ordinarily be held liable for breach of their contractual undertakings when their members take their arbitrable disputes to the picket line rather than to the grievance-arbitration machinery. The fact that such breach occurred as the result of unauthorized activities by "wildcatters" would ordinarily not excuse the breach. BCOA does not contend, however, that the International and District 17 should be held strictly responsible for all such unauthorized work stoppages. However, recognizing that the Union has at its disposal an array of alternatives for influencing the illegal strikers to return to work, BCOA contends that the International and District 17 should at the very least be compelled as a matter of contract law to exercise these alternatives to attempt to prevent or end the illegal work stoppages by their

34. For example, in *Day v. United States, supra,* the extrinsic force was an extraordinary flood; in *Columbus Ry., Power & Light Co. v. City of Columbus, supra,* the extrinsic force was wartime inflation; and in *Barry v. United States, supra,* the extrinsic force was a strike against the defendant coal supplier.

35. Brief, *supra* at 11, n.4.

members. Otherwise, their contractual undertakings will surely be rendered illusory.

Thus, for these additional reasons, the Court below erred in failing to recognize a legal obligation on the part of the International and District 17 to use all reasonable means at their command to prevent or end illegal strikes by their members over arbitrable disputes.

III. The Bargaining History Of The National Bituminous Coal Wage Agreements Does Not Preclude An Implied Obligation On The Part Of The International Union And Its Administrative Subdivisions To Use All Reasonable Means At Their Command To Prevent Or Terminate Illegal Strikes By Their Members Over Arbitrable Disputes.

The Court below refused to recognize a contractual obligation on the part of the International Union and District 17 to use all reasonable means to prevent or end illegal strikes by their members, primarily on the grounds that the "bargaining history" of the labor agreements showed no intent to impose any such obligation on the UMWA. The Fourth Circuit reasoned that since bituminous coal wage agreements as late as 1941 had contained express no-strike language and, in 1950-52 had also contained express language requiring the UMWA to exercise its best efforts to prevent work stoppages, the absence of such express provisions in the agreements in question precluded the court from implying such obligations.[36] *Amicus* BCOA respectfully submits that this so-called "bargaining history" theory is without merit and has in fact already been rejected by

36. *Carbon Fuel Company v. United Mine Workers of America, supra,* 582 F.2d at 1350.

this court in *Gateway Coal Company v. United Mine Workers of America,* 414 U.S. 368 (1974).

In *Gateway Coal,* the United Mine Workers of America argued, *inter alia,* that a "no-strike" clause should not be implied in the 1968 National Bituminous Coal Wage Agreement because express "no-strike" language had appeared in agreements as late as 1941 but was expressly rescinded in the 1947 agreement and in subsequent agreements, including the 1968 Agreement.[37] Despite this bargaining history, and despite the express "resission" language contained in the 1968 Agreement, the Court in *Gateway* nevertheless held that the broad "Settlement of Disputes" provisions in the 1968 Agreement gave rise to an *implied no-strike obligation.*

The Court should similarly reject the Fourth Circuit's bargaining history theory in the instant case. As discussed in Part I above, unless the International and its administrative subdivisions are required to exercise all reasonable means to prevent or terminate illegal strikes over arbitrable disputes, the arbitral process in the bituminous coal industry will be rendered illusory and fundamental principles of our national labor

37. The Union in *Gateway* relied upon Paragraph 1 of the Miscellaneous section of the 1968 Agreement which provides:

> Any and all provisions in either the Appalachian Joint Wage Agreement of June 19, 1941, or the National Bituminous Coal Wage Agreement of April 11, 1945, containing any 'no strike' or 'penalty' clause or clauses or any clause denominated 'Illegal Suspension of Work' are hereby rescinded, cancelled, abrogated and made null and void.

Gateway Coal, supra, 414 U.S. at 384, n. 15.

policy will be frustrated. The Union's evidence of bargaining history is a slender thread indeed upon which to base a contractual interpretation that would have such disastrous impact on our national labor policy. Instead, the Court should rule that the Union's implied duty to exercise all reasonable means to prevent or terminate illegal strikes by its members can be negated only where the contractual language itself contains an *explicit expression* of an intention to negate a "reasonable means" obligation. Clearly, there is no such explicit expression in either the 1968 or 1971 Agreement.

To the contrary, in the Settlement of Disputes provisions in both the 1968 and 1971 Agreements, the Union has expressly pledged to settle localized disputes as soon as practicable pursuant to the machinery provided in those provisions (*i.e.* pursuant to the grievance-arbitration process) and to maintain the integrity of the Agreements. Clearly, such promises must be construed to encompass the utilization of all reasonable means at the Union's command to attempt to settle such disputes by means of grievance arbitration rather than by work stoppages over such disputes. Accordingly, contrary to the Fourth Circuit's holding, the bargaining history and language of the National Bituminous Coal Wage Agreements support the Company's position that the International and its administrative subdivisions are legally obliged to use all reasonable means to prevent or end illegal work stoppages by their members.[38]

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38. The Union's evidence of bargaining history regarding "best efforts" actually consists solely of language that appeared only in the 1950-1952 labor agreement and that obliged the Union to "exercise [its] best efforts through available disciplinary measures to pre-

(Footnote continued on following page.)

Moreover, as discussed in Part I above, § 204(a) of the Labor Management Relations Act expressly mandates that employees and their representatives shall exert *every reasonable effort* to maintain the labor agreements they enter into. This explicit statutory duty cannot be negated simply by the appearance of an express "best efforts" clause in the 1950 National Bituminous Coal Wage Agreement and its absence in subsequent agreements.[39] Instead the more logical inference to be drawn from the absence of such express "best efforts" language in subsequent agreements is

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(Footnote continued from preceding page.)

vent stoppages of work by strike or lockout pending adjustment or adjudication of disputes and grievances in the manner provided in this agreement." This language was simply removed from the agreement two years later. Unlike the "no-strike" language that had appeared in earlier agreements and was expressly rescinded, there was no provision inserted into the 1952 labor agreement to "rescind" the best efforts language nor was there any language inserted into any of the subsequent agreements indicating an intent by the parties to negate the obligation associated with such language. Accordingly, there is no evidence whatsoever that the parties—simply by silently removing certain language from the agreement in 1952—intended to negate a "best efforts" obligation for all succeeding agreements. Moreover, since the Court has refused to negate a no-strike obligation in the 1968 Agreement despite the express "recission" language in that very agreement, it necessarily follows that a "best efforts" obligation should not be negated where, as here, the 1968 and 1971 Agreements contain no expression whatsoever of any intent to negate such obligation.

39. In fact, it could be argued that the statutory command in § 204(a) invalidates as a matter of public policy even explicit expressions of an intent to negate a party's duty to use all reasonable means to fulfill its contractual undertakings.

that the parties assumed, rightfully, that such an obligation was implied as a matter of national labor law and of traditional contract law. In any event, the statutory command in § 204(a) constitutes further indication that the Fourth Circuit's bargaining history theory lacks merit.

In sum, there is nothing in the bargaining history of the labor agreements to preclude the Court from recognizing the legal obligation of the International Union and its administrative subdivisions to exercise all reasonable means at their command to prevent or terminate illegal work stoppages by their members over arbitrable disputes. On the contrary, the language of the agreements, as well as fundamental principles of labor law and contract law, require that such an obligation exist.

IV. An Implied Obligation On The Part Of The International And Its Administrative Subdivisons To Use All Reasonable Means At Their Command To Prevent Or Terminate Illegal Strikes Does Not Make The International And Its Administrative Subdivisions Insurers Of Compliance With Labor Agreements By Their Members.

The Company does not seek in this action to hold the International and District 17 strictly liable as "insurers" of the Company's losses during any and all illegal strikes by their members. Rather, the Company simply seeks to hold the International and District 17 responsible when they fail to make a good faith effort to exercise all *reasonable means* available to them to prevent or terminate such illegal work stoppages.

As discussed above,[40] the International and its Districts have authority to impose various sanctions on their Local Unions as well as on individual officers and members thereof who instigate, aid, condone, ratify or participate in illegal picketing or work stoppages. We are asking the Court to recognize that the International and its administrative subdivisions are legally obligated to exercise these available powers. If the Union does so, and an illegal strike continues nevertheless, the Union would not be held responsible.

Those courts which have adopted the position we advocate have made clear that if the union has exercised all reasonable means at its command to prevent or terminate an illegal strike by its members, the union will not be held liable for the employer's losses resulting from the strike. For example, in *Eazor Express, supra,* 520 F. 2d at 967, the Third Circuit spoke directly to this question:

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40. *See* Brief, *supra* at 11, n.4.

> If the unions had made a showing of the use of strong and punitive measures without result it would have been for the district court to determine whether they had relieved themselves from liability by fulfilling their obligation to exhaust all reasonable measures available to them to end the strikes. In determining whether available measures were reasonable the sole test would be whether they were within the power of the unions to employ and might be likely to be effective to end the strikes.

All of the additional cases which recognize an affirmative obligation on the part of labor unions to prevent or terminate illegal strikes similarly define that obligation as requiring *reasonable efforts. United States Steel Corp. v. United Mine Workers of America,* 534 F.2d 1063, 1073 (3d Cir. 1976); *Republic Steel Corp. v. United Mine Workers of America,* 570 F.2d 467, 479 (3d Cir. 1978); *Bituminous Coal Operators' Ass'n., Inc. v. United Mine Workers of America,* 585 F.2d 586, 596 (3d Cir. 1978). *See Wagner Electric Corp. v. Local 1104, IUE,* 496 F.2d 954, 956 (8th Cir. 1974).

Accordingly, as these courts have recognized, adoption of our position would not impose an unrealistic or impracticable standard of conduct upon the International or its administrative subdivisions. Rather, the International and its administrative subdivisions would simply be required to make a good faith effort to use all reasonable means available to them to fulfill their express contractual undertakings. A standard which requires anything less would clearly frustrate our national labor policy.

CONCLUSION

For the reasons stated, it is respectfully submitted that the judgment of the United States Court of Appeals for the Fourth Circuit should be reversed with instructions to affirm the judgments of the District Court against the International Union and District 17.

Respectfully submitted,

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